IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL.,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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International Association of Machinists and Aerospace Workers (AFL-CIO), its District Lodge No. 91, and its Local Lodges Nos. 743 and 1746 pray that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut in this case.

OPINIONS BELOW

The opinions of the Superior Court are not reported. They are reprinted in the separate Appendix to this Petition ("A.") at pp. 1-27 (pre-trial memoranda), 29-55 (decision on liability) and 56-64 (decision on damages). The decision of the Supreme Court of Connecticut is not yet officially reported. It is reprinted at A. 65-89, amended at A. 91.

JURISDICTION

The decision of the Supreme Court of Connecticut was entered on April 27, 1971. A timely motion for reargument was denied on May 11, 1971 (A. 90). On August 10, 1971, Mr. Justice Harlan extended the time for filing this petition to October 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). There is a substantial question whether the judgment below is "final" for purposes of that section; that question is fully discussed at pp. 9-13, *infra*.

QUESTION PRESENTED

May a state court award punitive damages in an action based on violence committed during a strike for a collective bargaining agreement against an employer subject to the National Labor Relations Act, 49 Stat. 449 *et seq.*, 61 Stat. 136 *et seq.*, 29 U.S.C. § 141 *et seq.* ("the Act") where:

(a) The action is brought to coerce the defendant union to withdraw unfair labor practice charges before the National Labor Relations Board and an action under § 301(a) of the Act in a United States District Court;

(b) Compensatory damages have not been established; and

(c) The punitive damages include plaintiff's expenses in litigation of matters on which plaintiff did not prevail ?

STATUTE INVOLVED

This case involves §§ 7, 8(a)(1), 10(a), 10(b), and 301(a) of the Act. These provisions are reprinted at pp. 23-24, *infra*.

STATEMENT OF THE CASE

1. THE FACTUAL BACKGROUND.

This case arises out of two separate, consolidated actions by respondent United Aircraft Corp. (hereafter referred to as "the Company" or "the employer") for damages allegedly caused by violence in a strike by defendant Unions against the company. Respondent is engaged in the manufacture of airplane engines and parts at several plants in Connecticut, including plants at East Hartford and Manchester (in the Pratt & Whitney Division) where the employees are represented by Local Lodge 1746, and at Windsor Locks and Broad Brook (in the Hamilton Standard Division) where the employees are represented by Local Lodge 743. The Local Lodges are affiliates of the International Association of Machinists (hereinafter referred to as "the International"), and of its District Lodge 91. Respondent is an "employer engaged in commerce" and petitioners are "labor organizations" subject to the National Labor Relations Act.

For many years prior to 1960, plaintiff and the respective Local Lodges were parties to collective bargaining agreements. The Lodge 1746 agreement expired on December 7, 1959, and the Lodge 743 agreement expired on April 21, 1960. A strike at the plants started June 8, 1960, and ended August 11, 1960. (A. 30, 32).

While the record in this case is lengthy, the facts necessary for an understanding of the issues presented by this Petition, and of its procedural posture, can be stated in brief compass.

In the course of the first days of the strike (from June 8-13), the strikers engaged in mass picketing in front of the entrances to the employer's plants as well as assorted other acts of misconduct directed at indi-

vidual strikers. On June 13 the state court approved and entered a stipulation prohibiting mass picketing and violence, but allowing picketing to continue. On June 16 a similar stipulation was entered by the federal court at the instance of the National Labor Relations Board in a suit under § 10(j) of the Act. These stipulations limited the number of pickets and prohibited tortious conduct on the picket lines (state court) and also off the picket lines (federal court). Announcement of the stipulations brought an immediate end to the mass picketing and misconduct on the picket lines. (A. 48). Approximately fifteen isolated and sporadic incidents of misconduct, each directed against only one individual, were found to have occurred around plant entrances in the eight week period between the stipulations and the end of the strike.

2. PROCEEDINGS BELOW.

A. The Complaints and Proceedings Before Trial

Respondent filed separate complaints in the Superior Court of Connecticut against the Unions, charging them with injury to its property by strike violence. One complaint involved the strike at Pratt & Whitney and prayed for $10,000,000 in compensatory damages; the second made identical allegations with respect to the strike at the Windsor Locks and Broad Brook plants in its Hamilton Standard Division and prayed for $5,000,000 in compensatory damages. Both complaints additionally sought exemplary damages.

The Unions filed pleas in abatement which alleged, *inter alia*, that the state courts lacked jurisdiction over the complaints because their filing constituted an unfair labor practice under the National Labor Relations Act. It was the theory of this defense that the purpose of the complaints was to coerce the unions into with-

drawing charges which had been filed before the National Labor Relations Board, and to dismiss a civil action under § 301 of the Act which they had brought in the United States District Court for the District of Connecticut.[1] These same grounds were asserted as special defenses to the complaint. The Superior Court sustained defendants' demurrers to the pleas in abatement and to the special defenses. (A. 1-28; on this issue see A. 3-5, 7-10, 23).

B. The Decisions at the Liability and Damage Trials.

The complaints were consolidated for trial before Gaffney, J. Separate trials were held on liability and damages. Since the present Petition is not addressed to the propriety of the liability findings, it suffices to state the trial court's conclusions. That court determined that tortious acts of violence had been committed during the strike and that the Unions were responsible therefor. Although the Unions had entered into a state court stipulation against violence on June 13, the Court held that their responsibility for subsequent tortious conduct continued.[2]

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[1] The major thrust of both proceedings was that the company had denied the strikers the reinstatement right to which they were entitled under the Act and the strike settlement agreement. NLRB Cases 1-CA-3355 *et al.*; U.S.D.C. Conn. Cases 9084, 9085. Both the Board and the District Court ultimately resolved these issues in the Company's favor. *United Aircraft Corp.*, 192 NLRB No. 62 (July 30, 1971); *Lodge 743, Int. Ass'n of Machinists* v. *United Aircraft Corp.*, 299 F.Supp. 877 (D.C. Conn.). Review of both decisions will be sought when the District Court decision becomes final.

[2] The Court did this on the following reasoning:

> "This illegal activity on the picket lines ceased abruptly the moment the stipulation was agreed upon and approved by the court. Thereafter, however, hundreds of complaints of harassment were made to company officials. These in-

After another lengthy trial, the Court found that the company had suffered strike losses caused by the Unions' tortious conduct of $1,369,726.25 at Pratt & Whitney, and $88,662.00 at Hamilton Standard (A. 62-63). The theory on which the Court found that plaintiff had suffered almost $1.5 million of actual damages was that defendants' actions had caused involuntary absenteeism and that this involuntary absenteeism in turn had caused excessive manufacturing costs and wasted overhead.[3]

The trial court also allowed exemplary damages of $296,000 based on plaintiff's costs of litigation. (A. 63).[4]

C. The Decision of the Connecticut Supreme Court.

On appeals by both sides—the Company claiming that the trial court's judgments were inadequate—the

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cluded damage to personal property, autos, threats, obscenities and vituperations. The complaints continued until the end of the strike August 11, 1960." (A. 48)

Compare the Supreme Court's opinion reversing on this issue, A. 79-80.

[3] The company's claim that it was entitled to recover for losses due to involuntary absenteeism was an alternative to the even more sweeping assertion that it should be permitted to recover its entire "strike loss" from defendants. Plaintiff advanced two thories: (1) Violence and threats of violence so permeated the strike that they transformed it from a lawful one into an unlawful one; (2) Because the unions were weak, they would not have undertaken to strike unless they had relied upon illegal mass picketing, violence and threats of violence to enhance its effectiveness; this inferred plan to resort to unlawful conduct, according to plaintiff, illegalized the strike. The trial court rejected both theories (A. 61). The Court also refused to accept one variant of plaintiff's involuntary absentee theory, namely, that since the strikes would have terminated but for the tortious conduct, plaintiff was entitled to recover all the loss attributable to its continuation. (*Id.*)

[4] The Court allocated ⅔ of these exemplary damages to the Pratt & Whitney case and ⅓ to the Hamilton Standard case.

Connecticut Supreme Court entered the following order:

> "There is error in part, the judgment is affirmed in each case except as to the amount of compensatory damages with interest awarded and a new trial is ordered in each case limited to that issue." (A. 89)

The court reasoned that the Unions' liability for violence in front of plaintiff's plants, both before and after the June 13, 1960, stipulation, was adequately established. (A. 68-79). However, the court reversed the determinations of liability for incidents away from the plant. (A. 79-80). Because of the importance of those incidents, which could not be charged to the Unions, in the trial court's calculation of plaintiff's damages (A. 80, 84-87), and because of evidentiary errors which need not be detailed (*ibid*), the Connecticut Supreme Court held that the amount of compensatory damages would have to be retried and redetermined. In this retrial, defendant unions would be entitled to credit which the trial court had denied them, for the overtime hours worked during the strike against "wasted overhead" (A. 83). Despite all this, however, the Supreme Court affirmed the award of punitive damages. As to that issue the Court said (A. 87-88):

> "The plaintiff alleged, and the court found, that tortious illegal acts which occurred during the strike were wilful and malicious. Under these circumstances, the plaintiff was entitled to recover punitive or exemplary damages in an amount which would serve to compensate the plaintiff to the extent of its expenses of litigation less taxable costs."

The Court also rejected the Unions' objections to state court jurisdiction. (A. 67-68).

Thereupon, the Unions filed a timely motion for reargument addressed solely to the issue of punitive damages as it appeared in the light of the Supreme Court's reversal of the award of compensatory damages. The Unions urged that since the punitive damages were almost $300,000, and the amount, *if any,* of provable compensatory damages was unknown, the judgment for punitive damages should be set aside to be redetermined in light of the outcome of the proceedings on remand. Three grounds were stated:

(1) The Connecticut Supreme Court had never decided the important question of what relationship an award of punitive damages must have under Connecticut law to damages actually proven. This is an issue as to which there is a multiplicity of views among the states. See p. 18, *infra.* Defendants had a due process right to be heard on what the rule should be; the most appropriate time would be after the new trial on compensatory damages, unless these were found to be so great that the issue would be irrelevant.

(2) The award of punitive damages at a time when compensatory damages had not been established was contrary to federal law (citing *Linn* v. *United Plant Guard Workers,* 383 U.S. 53).

(3) It would be fundamentally unfair and contrary to federal law to require defendants to pay, in the form of punitive damages, *plaintiff's* costs of litigation of issues on which plaintiff did *not* prevail.

Alternatively, the Unions urged that if the Court were of the opinion that the award for punitive damages should not be set aside, it should modify its judg-

ment by reserving its own jurisdiction to alter that award after the proceedings on remand. It was pointed out that the finality of the state court's judgment for purposes of 28 U.S.C. § 1257 was in doubt, and that the unions would therefore be compelled to file an immediate Petition for Certiorari to review the punitive damage award lest a Petition filed after completion of all proceedings in the state courts be dismissed as untimely. The Unions said: "An order which makes clear that the entire judgment is subject to revision in this Court would relieve defendants of this dilemma, and would eliminate the burden of piecemeal application for and piecemeal review by the Supreme Court." (Motion for Reargument p. 5).

The Connecticut Supreme Court denied the motion for reargument. (A. 90). On the same day, however, it amended its opinion, adding the following sentence in the next to last paragraph thereof:

> "The court found that the plaintiff had sustained substantial damage, but, as we have stated, the amount thereof must be recomputed because the court allowed the plaintiff nothing for acts which occurred in the period during which it found that a nonviolent strike might have lasted and did award damages arising from events which occurred off the plaintiff's premises." (A. 91)

THE FINALITY OF THE STATE COURT JUDGMENT IS IN DOUBT

At the outset of our discussion of the problem of jurisdiction we wish to make clear that we seek certiorari at this time only out of an abundance of caution because this Court's decisions appear to place upon a party seeking review of a state court judgment the duty to do so *at the right time*. If a party fails to file at the

first opportunity on the assumption that the judgment lacks finality, and that view is mistaken, his petition from a subsequent judgment may be dismissed as untimely. See *Parker* v. *Illinois,* 333 U.S. 571. For this reason leading commentators have recommended that review be sought on the first occasion where the state court's judgment *may* be considered final, and then again from a subsequent judgment.[5]

In the present case, the question of finality is very much in doubt: under this Court's more recent decisions the judgment below appears to be final, but under earlier precedent, which has not been expressly disapproved, it would not be. Thus, petitioners invoke this Court's jurisdiction now, lest the opportunity for review of this large judgment be deemed abandoned. In view of our own doubts on the matter, and cognizant of the responsibility of counsel with respect to jurisdictional issues, we shall outline the competing considerations.

Diligent research has uncovered no case in which this Court has determined whether a state court judgment for an amount of money, subject to immediate execution, is "final" when further state court proceedings remain open to determine whether the plaintiff shall be awarded an additional amount. But recent decisions of this Court appear to indicate, by analogy, that such a judgment is indeed "final." Last term in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 418, n. 4, a temporary injunction against the dis-

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[5] Stern and Gressman, *Supreme Court Practice,* 103 (4th ed., 1969). That, too, is the course which was followed in *Market Street Railroad Co.* v. *State Railroad Commission,* 324 U.S. 548, 549-550, by Francis R. Kirkham, Esq., a co-author of what was then the leading treatise on this Court's jurisdiction.

tribution of leaflets was held to be "final" notwithstanding the pendency of state court proceedings to determine whether the injunction would be made permanent. *Keefe* followed *Local No. 438* v. *Curry,* 371 U.S. 542, and *Hudson Distributors Inc.* v. *Eli Lilly and Co.,* 377 U.S. 386. *Curry,* like *Keefe,* granted review of a preliminary injunction.[6] In *Hudson Distributors* this Court held final the reversal by the Ohio Supreme Court of a declaratory judgment (obtained by Hudson) that an Ohio statute was unconstitutional where the reversal was joined with a remand for further proceedings on Lilly's cross-claim for injunctive relief. These cases taken together would appear to support the proposition that a judgment is "final" when it finally determines that a party is or is not entitled to a particular form of relief, even though proceedings remain in the state courts with respect to additional or different kinds of relief. On that view, then, the judgment below was indeed "final."[7]

These more recent decisions differ in approach, though they do not purport to overrule, more restrictive views of finality embodied in such cases as *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62. There, a divided court held to be non-final a judgment which affirmed an administrative order requiring the petitioner to take gas ratably from a particular producer, but leaving open for later determination the terms

[6] In that type of situation failure to grant immediate review would "effectively dispose of petitioner's rights and render entirely illusory his right to review here * * *." (371 U.S., at 550).

[7] Two other recent cases which take an expansive approach to finality are *California* v. *Stewart,* 383 U.S. 903, and *Mills* v. *Alabama,* 384 U.S. 214. However, the grounds on which jurisdiction was asserted in those cases appear to have no bearing on the present problem.

upon which the petitioner must do so. In the course of a thorough discussion of the standards for determining finality, Mr. Justice Frankfurter made two observations which appear to cut sharply against the finality of the judgment in the present case. First, he said:

> "Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment." 334 U.S., at 70.

The precise effect of the judgment below is to require petitioners to pay the company about $300,000; if that judgment is ultimately reversed, after all state court proceedings are completed, petitioners will have been "temporarily out of pocket."[8] The second observation made by Justice Frankfurter which particularly bears on the present case is that this Court "ought not to pass on constitutional issues before they have reached a definite stop." *Id.* at 71. One of the issues in this case is the relationship between punitive and compensatory damages in suits for strike violence. In that connection it is noteworthy that the absence of finality the *Republic* case was predicated in part on the possibility that the posture of the constitutional issues "may well be affected by the fate of the unresolved contingencies of the litigation." *Id.* at 71. This is equally true here, for one of the federal claims raised by the present Petition—a plaintiff may not be awarded punitive damages unless he has been awarded compensatory

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[8] The situation would be otherwise if respondent's solvency were in doubt. In that event, petitioners might "be irreparably injured if review were unavailing." 334 U.S. at 68. Where the injury is irreparable the judgment is considered final. *Ibid.* The *Curry* line may be reconcilable with *Republic* on this basis. See p. 11, n.6, *supra*.

damages—would be mooted if the Company were to establish substantial compensatory damages on remand. On the other hand, if the respondent were to be awarded none or insubstantial compensatory damages, the Connecticut Supreme Court might choose to alter its own decision. Failing that, the question we present here would emerge in sharpest focus.

The short of the matter is that the present case appears to implicate several of the elements which this Court has deemed relevant in determining whether a state court judgment is final for the purpose of 28 U.S.C. § 1257. The Court may therefore wish to grant certiorari to allow plenary consideration of the finality issue and to clarify what is presently a cloudy area of this Court's jurisdiction. Of course, the necessity for petitioners to file, and for this Court to consider, the present Petition would have been avoided if the court below had, as we urged, reserved jurisdiction to alter the exemplary damage award. Compare *NAACP* v. *Williams,* 359 U.S. 550.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS SUBSTANTIAL AND IMPORTANT QUESTIONS CONCERNING THE SCOPE OF THE LABURNUM-RUSSELL DOCTRINE.

In *United Construction Workers* v. *Laburnum Corp.,* 347 U.S. 656, and *Auto Workers* v. *Russell,* 356 U.S. 634, this Court held that state courts may entertain suits against labor unions for damages arising out of strike violence, and may award punitive damages to the successful plaintiff. The court below treated those decisions as having disposed of all questions concerning state court jurisdiction over such suits and affirmed an enormous judgment for punitive damages although the fact and amount of actual damages suffered by plaintiff

have not been finally determined. Because of its exaggerated view of the *Laburnum-Russell* precedents the court failed to heed other decisions of this Court which restrict the use of private litigation to impair the exercise of federally-created rights. Thus, the present case raises substantial and important questions concerning the scope and limitations of the *Laburnum-Russell* doctrine.

A. The Court Below Was Without Jurisdiction Because the Present Suit Is a Weapon of Economic Coercion To Chill the Exercise of Federal Statutory Rights.

Petitioners have insisted from the outset that the state courts were without jurisdiction to entertain the present suits because these were brought by the company to coerce the unions to abandon charges brought under § 10(b) of the Act before the National Labor Relations Board, and a suit under § 301 of the Act alleging that the company had violated the strikers' statutory and contractual reinstatement rights. The court below acknowledged it to be our position (A. 68), in reliance on *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 64, that "federal law prohibits employers from using state court damage suits, predicated on strike misconduct, as 'weapons of economic coercion' ". The Court rejected this argument as follows (A. 68):

> "The assertion of the accepted right to bring a state court action for damages arising from tortious conduct, as in the present cases, does not come within the ambit of the proposition stated even if the case relied on supported it." *Ibid.*

This explanation is tantamount to a refusal to follow the authority of *Linn.* For this Court there dealt precisely with the "right to bring a state court action for

damages arising from tortious conduct" (*ibid.*), and, while vindicating that right, recognized that it must be qualified lest such suits become "weapons of economic coercion" to impede the exercise of *federal* rights.

The proposition that state courts may not entertain suits, the objective of which is to compel the defendant to withdraw unfair labor practice charges, is so clear that it can be stated in the form of a syllogism:

1. A state may not take action which impedes a party's right to access to the National Labor Relations Board. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 238; cf. *NLRB* v. *Marine Workers,* 391 U.S. 418, 424.[9]

2. The assertion by a state court of jurisdiction over a damage suit and the entry of judgment therein is a form of state action which cannot be utilized to thwart federal objectives. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 64-66; *New York Times* v. *Sullivan,* 376 U.S. 254, 265, 279-280; *Farmers Educational & Coop. Union* v. *WDAY, Inc.,* 360 U.S. 525, 535; *Barrows* v. *Jackson,* 346 U.S. 249, 254.

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[9] In *Nash* the Court said: "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." 389 U.S., at 238. The Court held that a state may not deny unemployment compensation to a person because he filed a charge with the Labor Board; such denial "has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." *Id.* This congressional policy was reaffirmed in *NLRB* v. *Marine Workers,* 391 U.S. 418, 424, which held that a union had violated the Act by disciplining a member for filing a charge with the Board without exhausting internal union remedies; the union rule which was there denied effect did not entirely foreclose, but merely delayed, access to the Board. How much greater is the "financial burden" (*Nash,* 389 U.S. at 239) imposed by the present actions where plaintiffs prayed for judgments totalling $15,000,000 *plus* punitive damages!

3. *Ergo,* a state court is without power to entertain and award damages in a suit whose objective is to impede access to the Board.

The identical reasoning, of course, leads to the same result where the state court suit also seeks to compel withdrawal of a § 301 suit. For the right to vindicate federal claims in federal court is likewise protected by the Supremacy Clause from interference by state courts. See *e.g., Donovan* v. *Dallas,* 377 U.S. 408, 412-413; cf. *Brotherhood of Railway Trainmen* v. *Virginia,* 377 U.S. 1, 7.

B. Punitive Damages Cannot Be Awarded to a Party Who Has Not Established Actual Damages.

As this case now stands, the company has obtained an award of about $300,000 of punitive damages without establishing a penny of actual damages. This raises the question whether state courts may award punitive damages in a tort suit based on strike violence to a plaintiff who has thus far not proven any actual damages therefrom. Here again we submit that the issue is controlled by *Linn* v. *United Plant Guard Workers,* 383 U.S. 53. For there this Court squarely held (*id.* at 66):

> "the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.[8]

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[8] It should be noted that punitive damages were awarded in *Laburnum* and *Russell.* In both instances there was proof of compensatory injury resulting from the defendants' violence."

Thus, even as *Linn* allowed a defamation suit by analogy to *Laburnum* (*id.* at 61-62, 64, n. 6) it rejected,

on the authority of that case, the suggestion that punitive damages not be allowed.[10] But even as the right to sue was qualified in order that it not become a weapon of economic coercion, so the right to collect punitive damages was conditioned on prior proof of compensatory damages. Thus, while this Court has not yet said in so many words that punitive damages can be obtained in a suit based on strike violence only if there is an award of actual damages, that conclusion clearly follows from what was decided in *Linn,* particularly since the Court took pains to note that there had been "proof of compensatory injury from the defendants' violence" in *Laburnum* and *Russell.*

Here again no principled distinction suggests itself between tort suits for defamation situations and those based on strike violence. For none of the state interests which have been held to justify private suits for strike violence, notwithstanding the availability of Labor Board remedies, require that parties who do not establish actual damages be allowed to recover punitive damages. Private suits by parties who do show damages, and criminal and injunctive proceedings brought by the state itself, provide an ample arsenal of remedial weapons to vindicate "the compelling state interest in the scheme of our federalism in the maintenance of domestic peace." *San Diego Unions* v. *Garmon,* 359 U.S. 236, 247. And, of course, to the extent that the *Laburnum-Russell* doctrine rests on the importance of affording a remedy for private injury, it does not justify a recovery by one who does not show such injury. On the contrary, to allow recovery would be inconsistent with the prior decisions of this Court

[10] Brief for the National Labor Relations Board, No. 45, Oct. Term, 1965, pp. 46-47.

involving "the right of states to deal with violence and threats of violence appearing in labor disputes" (*Mine Workers* v. *Gibbs*, 383 U.S. 717, 729) for, as this Court said in *Gibbs:*

> "Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic peace." *Id.* at 729-730.

In our view, the proper accommodation of federal and state interests requires yet a further clarification of the availability of punitive damages: If these are to be retained they must bear some reasonable relation to the actual injury. Cf. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 72-78 (opinion of Harlan, J.), 82-87 (opinion of Marshall, J.)[11] On this premise, if on retrial, plaintiff proves little compensatory damage compared to the size of the punitive damages awarded, we would argue that the punitive damages are excessive. At this point, however, when plaintiff has not yet proven *any* compensatory damages, *Linn* plainly requires reversal of the punitive damage award.

C. Federal Law Does Not Allow Charging Defendants With All of Plaintiff's Litigation Costs.

The punitive damages in this case were determined, in accordance with Connecticut law, on the basis of plaintiff's total litigation costs. In the ordinary case where the plaintiff prevails on all the major litigated

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[11] This is the view of the majority of states that have passed on the issue. See *Anno.* 17 A.L.R. 2d 527. If certiorari is granted, we shall also urge on this point that the court below denied petitioners due process by refusing to decide this issue as a matter of state law. See p. 8, *supra.*

issues, this measure of damages is not unreasonable, and indeed may be sounder than leaving the trier of fact at large to arrive at some amount without any objective standards. But in a case where the plaintiff is not entirely successful, the rule has anomalous results: it places the defendant at his adversary's mercy, for it permits the plaintiff to "vastly increase the fee burden on a defendant by pursuing a plethora of unsubstantial claims." *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F. 2d 61, 92 (C.A. 1). A rule which allows one party to play "heads I win, tails you lose" in this manner is far too arbitrary to accord with due process of law even where the defendant has committed a tort and the award goes under the rubric of "punitive damages." And where it imposes damages on the party who has successfully litigated a *federal* issue it places a burden on the exercise of a federal right which this Court should not tolerate. Yet that is precisely the effect of the judgment below.[12]

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[12] For example, under *Mine Workers* v. *Gibbs*, *supra*, defendants had a federal right not to be mulcted for damages exceeding those which plaintiff could establish to have been proximately caused by violence. The damage trial was devoted to that issue. The judgment below awards plaintiff $37,000 for expenses which the findings show to have been incurred by plaintiff solely in connection with the damage trial (Findings 753, 754, 756; Record 309-310); it also awards $150,000 in attorneys' fees and $64,500 for time spent by plaintiff's personnel, much of which must be attributed to the damage trial (Findings 747, 749, 755; Record 308-310). Yet the outcome of that damage trial was nullified by the State Supreme Court. Similarly, the attorneys' fees and the expenses of plaintiff's personnel include appearances during the many days of the liability trial which resulted in the findings which were ultimately reversed on the Unions' appeal. Indeed, the judgment below requires defendants to pay plaintiff for the time spent in Court by its witness Morse, whose testimony was objected to as hearsay and the admission of which was a major ground for reversal (A. 80).

This Court has recognized that parties may be discouraged from good faith litigation even by the risk of having to pay their adversary's costs when they lose. See *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 235. That inhibition is, of course, far more drastic where the party must bear the cost of litigating major issues regardless of the outcome. And so, under those statutory schemes which do allow the prevailing party to recover expenses, the federal courts have carefully molded their relief to avoid such consequences, most recently in *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F. 2d 61, 91-92, where Judge Coffin lucidly set forth the governing considerations. See also *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers*, 241 F. Supp. 476, 489 (E.D. Mo.), *aff'd*, 368 F. 2d 679 (C.A. 8); *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 218 F. Supp. 490, 492 (D. Mass.), *rev'd on other grounds, Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F. 2d 798 (C.A. 1); *Osborn* v. *Sinclair Refining Co.*, 207 F. Supp. 856, 864 (D. Md.), *rev'd on other grounds*, 324 F. 2d 566 (C.A. 4).

When this Court authorized punitive damage awards in *Laburnum* and *Russell* it did not remotely contemplate that such awards would penalize the exercise of the constitutional right to defend, particularly to the extent that such defense was successful. Rather, as we already have shown, it restricted the remedy to the protection of "compelling state interests." See p. 18, *supra*, quoting from *Gibbs*, 383 U.S., at 729. The decision below is so fundamentally unfair, and so out of harmony with other federal decisions dealing with the litigation costs recoverable by plaintiffs, that it ought not stand.

CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statutory Provisions Involved

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the

Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

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SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.